OCT 15 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-417

HEIRS OF HUBERT BURAT (BURAS)
Plaintiff-Appellants

versus

BOARD OF LEVEE COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT OF THE STATE OF LOUISIANA,
Defendant-Appellees

APPLICATION FOR WRIT OF CERTIORARI AND REVIEW OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Plaintiffs pray that a writ of certiorari issue to the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on July 15,1974.

OPINION BELOW

The opinion for the Court of Appeals for the Fifth Circuit is not yet reported. A copy, however, is attached to this Application. As to the substance of that opinion, the Fifth Circuit affirmed the decision of the trial court which dismissed the action at bar on grounds that the plaintiffs did not assert a right of action recognizable under the "Federal Question" jurisdiction created by 28 U.S.C. 1331. The court granted

this dismissal and assigned written reasons. Although these written reasons have not been published, a copy is attached to this Application.

JURISDICTION

Plaintiffs invoke the jurisdiction of the United States pursuant to 28 U.S. Code §1254 (1). Relief is sought from a judgment entered from the Court of Appeals on July 15, 1974 and from which a petition for rehearing was denied on July 31, 1974.

ERRORS PRESENTED

1. The Court of Appeals erred in denying federal jurisdiction in clear disregard of a conflict between two federal patents. A conflict which was legally and constitutionally susceptible of resolution only in a federal form.

2. The District Court erred in ignoring the clear import of the decision of this Court in Oneida a decision which clearly required federal jurisdiction, when as here, title to land is rooted in laws guaranteed by treaties of the United States.

3. The Court of Appeals erred in denying jurisdiction in circumstances which the controlling and, indeed, the only relevant rules of decision are contained within the Constitution, treaties and statutes of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case calls into question the authority of a state to interfere with or subtract from the plenary powers over lands

within the public domain of the United States which is exclusively vested in the Congress by Article 4, §3 of the United States Constitution.

STATUTES AND TREATIES INVOLVED

1. The Louisiana Purchase and ancillary treaties of 1803;

2. 28 U. S. Code §1331;

3. Act of Congress of March 26, 1804 (2 Stat. 183);

4. Act of Congress of March 2, 1805 (2 Stat. 324);

5. Act of Congress of February 28, 1806 (2 Stat.352);

6. Act of Congress of April 21, 1806 (2 Stat. 391);

7. Act of Congress of April 25, 1812 (2 Stat. 713);

8. Act of Congress of May 11,1820 (3 Stat. 573);

9. Act of Congress of January 12, 1825 (4 Stat.80);

10. Act of Congress of February 6, 1835 (4 Stat. 749);

11. Act of Congress of July 6, 1842 (5 Stat. 491);

12. Act of Congress of June 2, 1858 (11 Stat. 249);

These many provisions are lengthy and only the pertinent portions are set forth in this application.

STATEMENT OF THE CASE

The suit at bar is a class action. The plaintiffs, who represent some 550 of the heirs of Hubert Burat assert federal rights and title to certain lands in Plaquemines Parish, Louisiana, lands which Hubert Burat, a pioneer in all the best senses of the word, carved from the wildernesses of lower Louisiana at the end of the 18th Century.

The Burat settlement was some sixty miles below New Orleans on the east bank of the Mississippi River. Hubert Burat endured flood, mosquitoes, storms, hurricanes and disease for this land. What is more, he did it all on his own. New Orleans was, in those days, a six day round trip by horse and civilization's only real outpost was a priest who made it "down below" perhaps once a year to solemnize marriages, christen babies and resolve quarrels.

The exact date that the Burats came to Louisiana is not a matter of record. It is clear, however, that some time before 1795 Hubert Burat became an "actual settler" on lands then and now known as the "Batture du Diable". He remained on this land until his death in 1847, a fact noted in the United States census figures for 1810, 1820, 1830, and 1840. The possession of his heirs is also confirmed by census information stretching from 1850 through 1880.

In 1803, he took a wife, Marie Louise Cosse, and joined the Union as a part of

the Louisiana Purchase. The terms of the treaty which implemented the Purchase required a series of statutes guaranteeing his right to claim the land he had worked and in 1820, he filed the affidavits necessary to perfect the claim in the local land office.

Covetous eyes, however, were on his land. A federally commissioned 1832 survey erroneously put the Burat estate on the wrong sections of land and in a corresponding error showed Hubert's lands as vacant. Four sets of outlaws took advantage of this error in 1836. Falsely asserting that they were "settlers" on the Burat estate, they secured, in that same year, certificates permitting purchase of the property. All four of these certificates were then assigned to one Andrew Hodge.

Meanwhile, in 1837, after a supplemental filing of the legitimate Burat claim, a federal register and recorder, (who had quasi-judicial powers) accepted Hubert's claim and included it in the 1837 report to the United States Congress. By special legislative act, Congress confirmed Hubert's ownership in 1842, which should have put an end to the matter.

It did not. Other federal officials were working on the outlaw titles with equal efficiency and dispatch. In 1838 and 1839 Hodge received colorable but illegal patents to the Burat tract. These patents were the result of funded purchases entirely regular in form. Someone, however, knew something was amiss, for Hodge quit-claimed two of the four sections back to the outlaws in 1841 and his heirs sold the other two back

to the United States in 1861, a buy-back of singular importance in the structure of this case.

The mess was never sorted out in Hubert's lifetime -- indeed it still needs a considerable untangling. Be that as it may, Hubert's son, Cyprien, began to dig into the title by correspondence with federal officials somewhere in the neighborhood of 1850. Hubert's succession had been opened by then; his wife and later, another son, Antonie Joseph, served as administrators. Cyprien's efforts led to the issuance of a patent certificate (but not a patent) in 1885. They also led him to an attorney -- James Wilkinson.

Wilkinson was smart enough to spot an opportunity and ambitious enough to make something of it. He and a collegue, James Bradford, a deputy surveyor of the Surveyor General's Staff, made a "second opening" of Hubert's estate -- as a vacant succession -- Wilkinson serving as curator. In that capacity he applied to Washington for land script alleging that the Burat claim was confirmed but unsatisfied, which is to say that there was a breakdown in the transmission of title from the United States to the Burats even though the claim itself was entirely valid. He was probably correct in that assertion.

In any event, Calhoun Fluker, the United States Surveyor General for Louisiana agreed. After a study and lengthy report he issued eight certificates for 80 acres each to Wilkinson in 1888. He accepted and concurred in the assertion that the claim was confirmed but unsatisfied. Wilkinson, as curator, then deeded the estate to Bradford

who secured the script and used it to buy land in Nebraska Territory.

So things remained and deteriorated for many years obscured by outlaw title and succession fraud alike. The Burat heirs did not secure a patent until 1972 and then only after extensive work by counsel and a quasi-judicial ruling by a representative of the Department of the Interior.

In the meantime, squatters and the State of Louisiana took their turns at the estate. The really significant land grab was made by the Orleans Parish Levee Board in a series of proceedings which, one gets the feeling, could have been staged and directed only by the Long family. Briefly, it was done this way: The Board expropriated the property proceeding by a "courthouse door notice" and/or by mesne conveyances to the levee board from persons purporting to have title from known outlaw interests. The owners of the land were usually described in courthouse door notices as "unknown".

Now all of this was a farce. The owners were anything but unknown for readily available public records contained documented evidence of the Burat claim, the outlaw titles, the buy-back by the United States and the resulting United States ownership of the land as well as the bogus "vacant" succession.

It must be understood that the expropriation was not only a violation of the plaintiffs' rights but a violation of the federal - state relationships spelled out in the United States Constitution. That document vests plenary discretion over lands in the public domain in the Congress. Thus, the

Levee Board violated not only the letter of the Constitution but the delicate balance between State and Federal Sovereignty, a blanace which can be restored only through the Offices of This Court.

By virtue of these expropriations, however, the Levee Board stands at bar claiming title to all four sections of the Burat estate. All other possessors hold only by virtue of whatever rights the Board may have had to give them.

ARGUMENT

I. THE COURT BELOW ERRED IN REFUSING TO RECOGNIZE THAT THE CASE AT BAR ARISES UNDER THE CONSTITUTION LAWS AND TREATIES OF THE UNITED STATES WITHIN THE MEANING OF 28, USCA, § 1331.

There has been a critical failure of focus upon the essence of the issues at bar. It is easy enough to state, as did the Court of Appeals, that the mere fact that title to land originates in a United States patent does not, of itself, require federal jurisdiction.

The presentation of that formula, however, when applied to the facts of this case is less than meaningful for it fails to come to grips with the constitutional question at bar and with the conflict between two federal patents, a conflict that can be resolved only in terms of a number of federal statutes and only by revoking one patent or the other.

This is not to say that the usual rule

does not have meaning. Refusal to take federal jurisdiction of many patent claims is no more than a recognition that the land has left the sphere of federal influence and that its ownership most usually will turn upon provisions of state law. Here, however, ownership turns upon constitutional and federal questions.

A. THE COURT OF APPEALS ERRED IN FAILING TO RECOGNIZE THAT THE PLAINTIFFS' CLAIM RESTS UPON RIGHTS VESTED BY THE UNITED STATES CONSTITUTION.

The Burat heirs claim a United States title given them in satisfaction of the Burat claim in 1972. The defendants, in the main, claim a title rising out of an act of expropriation by an agency of the State of Louisiana. This expropriation of lands owned by the United States is twice invidious. First, it is a clear violation of Article 4, §3, Cl. 2, of the United States Constitution which grants to the Congress of the United States and only to the Congress of the United States plenary powers over lands in the public domain. Second, it is an infringement upon the Constitution which threatens the Federal System, a more than delicate organism which requires an ever vigilant balance between state and federal authority. The plaintiffs submit that any fair reading of the relevant law squarely substantiates this premise. As Ruling Case Law points out:

PUBLIC DOMAIN AND AUTHORITY OF CONGRESS

9. Authority of Congress over Public Domain. -- Congress is invested by

the federal constitution with the power of disposing of and making needful rules and regulations respecting the public domain. In the exercise of this power, land offices have been established, officers appointed, the mode and manner of sales of the public domain regulated, and the manner by which the United States may be divested of the legal title prescribed. This power over public lands is without limitation, and has been considered the foundation on which the territorial governments rest. Under it Congress has the sole power to declare the dignity and effect of titles emanating from passing such a law, its propriety and constitutionality cannot be questioned. It may divest itself at once of all property in a portion of the public lands, and transfer it to an individual. It may also so legislate as to make the issuance of a patent necessary to effectuate that object. And under the words "dispose of" the public lands, used in the discretion, to authorize the leasing of the mines on the public lands, in the territories of the United States. Congress is bound, whoever, to regard the public treaties and it has no power to organize a board or revision to nullify titles confirmed many years before by the authorized agents of the government.

10. Conflict between State and Federal laws. -- The power of Congress in the disposal of the public domain

> cannot be interfered with nor its exercise embarrassed by any state legislation; nor can such legislation deprive the grantee of the United States of the possession and enjoyment of the property granted, by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition. Whenever the question in any court, state or federal, is whether a title to land which was once the property of the United States has passed, the question must be solved by the laws of the United States.

The defendants' suggestion that the constitutional question enters the case only as a defense is specious. To the contrary it is the primary authority upon which Congress acted in granting a patent to the heirs in 1972 and for that matter in buying back a part of the land in 1861.

Note also that this case presents what the laws of Louisiana describe as a petitory action. In this kind of case, the merits of the defense title need not be weighed or even offered to the trier of fact. Instead, the plaintiffs must affirmatively prove a title good against the world. Thus, the burden rests upon the plaintiffs to prove that the expropriation does not defeat their ownership and doing so is an essential feature of the plaintiffs' case.

B. THE COURT OF APPEALS ERRED IN FAILING TO RECOGNIZE THAT THE CASE AT BAR ARISES UNDER THE LAWS AND TREATIES OF THE UNITED STATES.

The case at bar presents two competing

patent chains. The key question therefore is not what happened to a title after it has passed from the sphere of federal influence but instead when, in favor of whom, and under what circumstances title left the public domain. This question turns solely upon federal treaties and statutes. Some bear vitally upon critical questions at bar; some only peripherally. Be that as it may, they are listed in chronological order, rather than in any order of emphasis.

THE TREATY OF 1803

A provision of the Louisiana Purchase treaty obligates the United States to see that the inhabitants of the ceded territory "shall be maintained and protected in having free enjoyment of their...property..." The United States Supreme Court has rightly made a great deal of this language. In Souland v. U. S., 4 Peters 511 (1930), the Court, by John Marshall, held that:

> "The United States, as a just nation, regard this stipulation as the avowal of a principle which would have been held equally sacred, though it had not been inserted in the contract. The term "property" as applied to lands, comprehends every species of title, inchoate or complete."

The sense of this is clear enough. It bound the United States by treaty to respect the rights which Hubert Burat had in his land, a commitment which may have been satisfied only in 1972 but one which was and is perpetually viable. This is to say that the United States assumed the obligation, by treaty, with France, of protecting Hubert Burat's rights in his land and nothing, to

this day, has diminished that obligation.

It is that obligation as well, which brings this case most surely within the ambit of the decision of this Court in the Oneida Indian Nation of New York State vs. The County of Oneida, ___U.S. ___, 94 S. Ct. 772. As the plaintiffs read that decision, the legally operative facts are these:

1) The existence of a possessory right in the Oneida Indians predating the presence of the United States in upper New York;

2) An allegedly wrongful taking of this right by a state -- the State of New York;

3) A continuing federal interest in the possessory right created by ancient treaties with the Oneida Indian Nation.

What is significant is that each of these elements is locked in the bone and sinew of the case at bar. Consider each in turn:

1) The Burat possessory right was secured under French and Spanish governments in Louisiana and long preceded the presence of the United States, which first came in 1803.

2) Here also there was a wrongful taking by a state -- an alleged illegal expropriation by an agency of the State of Louisiana -- The Orleans Parish Levee Board.

3) Here as well, there is a continuing federal interest in the land. Here, however,

there are two reasons rather than one for this continued interest:

a) Two of the four sections of land were bought back into public domain by the United States in 1861. Congressional control over the public domain is plenary and the necessary corollary of that control is plenary responsibility. This is, of course, a much stronger interest than that created by the ancient Indian treaties in Oneida.

b) Here too, there was a subsequent United States guarantee by treaty of the original possessory right. In this case that guarantee was incorporated into a specific provision of the treaty of 1803 and represents a treaty obligation which John Marshall described as "sacred".

Within this frame work, the plaintiffs submit that Oneida clearly requires reversal in the case at bar.

THE ACT OF MARCH 26, 1804 (2 Stat. 283)

The 8th Congress sat in 1804 and included in its business many of the problems attendant upon the Louisiana Purchase. Notably, it set aside any landholdings in the territory of the purchase of or by right of the Spanish government. It then made a proviso (Act of March 26, 1804) specifically excepting the rights of actual settlers pursuant to the treaty rights previously cited:

> "Provided nevertheless, that anything in this section contained shall not be construed to make null and void any bona fide grant, made agreeably to the laws, usage and customs of the Spanish government to an actual settler on the lands so granted, for himself and for his wife and family; or to make null and void any bona fide act or proceeding done by an actual settlor agreeable to the laws, usage and customs of the Spanish government, to obtain a grant for lands actually settled on by the person or persons claiming title thereto, if such settlement in either case was actually made prior to the twentieth day of December, one thousand eight hundred and three."

The beginning of the adjudication of this land case lies in the determination of the rights Burat did or did not secure pursuant to this statute. His basic claim to the land relates specifically to actual settlement on his estate during Spanish rule prior to 1795 and his marriage in 1803. Whatever those rights were, they were recognized and ratified by these provisions.

THE ACT OF MARCH 2, 1805 (2 Stat. 324)

The recognition of a right is one thing; the implementation another. In 1805 the 8th Congress provided machinery through which Burat might perfect his claim. The statute provides preliminarily:

> "...every person or to the legal representative or representatives of every person, who being either the head of a family of 21 years of age, had prior to the 20th day of December, one thousand eight hundred and three, with the permission of the proper Spanish officer, and in conformity with the laws, usages, and customs of the Spanish government made an actual settlement on a tract of land within the said territory, not claimed by virtue of the preceeding section or of any Spanish or French grant had the actual possession of the said territories, and who did on the said 20th day of December, 1803 actually inhabit and cultivate the said tract of land; the tract of land thus inhabited and cultivated, shall be granted."

In order to realize the grant, the act made it necessary:

> "...Every person claiming lands... shall before the first day of March, one thousand eight hundred and six, deliver to the register of the land-office, or recorder of land titles, within whose district the land may be, a notice of writing, stating the nature and extent of his claims, together with a plat of the tract or tracts claimed; and shall also, on or before that day, deliver to the said register or recorder, for the purposes

> of being recorded, every grant, order of survey, deed, conveyance, or other written evidence of his claim; and the same shall be recorded by the register or recorder, or by the translator hereinafter mentioned, in books to be kept by them for that purpose, on receiving from the parties at the rate of twelve and one half cents for every hundred words contained in such written evidence of their claims."

A further provision placed a time limit upon the making of claims:

> "...And if such person shall neglect to deliver such notice or writing of his claim, together with a plat as aforesaid, or cause to be recorded such written evidence of the same, all his right, so far as the same is derived from the two first sections of this act, shall become void, and for ever thereafter be barred; nor shall any incomplete grant, warrant, order of survey, deed or conveyance, or other written evidence which shall not be recorded as above directed, ever after be considered or admitted as evidence in any court of the United States."

It is significant to note that the statute clearly contemplates that cases or controversies arising out of these land claims should be treated as Federal questions, for the statute specifically reads "in any Court of the United States."

Commissioners or registrars and recorders where commissioned to handle the claims, and, it is significant to note, given quasi-judicial authority:

> "Each board or a majority of each board, shall, in their respective districts, have power to hear and decide in a summary manner, all matters respecting such claims, also to administer oaths, to compel the attendance of, and examine witnesses, and such other testimony as may be adduced, to demand and obtain from the proper officer and officers, all public records, in which grants of land, warrants, or orders of survey, or any other evidence of claims to land derived from either the French of Spanish governments may have been recorded; to take transcripts of such records of a public nature relative to the granting sale, transfer, or titles of lands within their respective districts; and to decide in a summary way, according to justice and equity on all claims filed with the register or recorder, in conformity with the provisions of this act."

In sum, this act confirmed and spelled out Burat's absolute right to transmission of title and established machinery which he ultimately put into play in order to perfect that right. The second part of the adjudicati of this case requires the determination of what rights were guaranteed him by said statut whether hemet the requirements which were provided.

There is another part of the adjudication which turns upon this statute. By virtue of extensions in the statutory period provided for the filing of claims, Burat filed affidavits and notices in 1820 and in 1837. In 1837 the register and recorder accepted the Burat claim and favorably reported it to Congress. Note that in 1837 an outlaw

title had already been secured and, there was, by virtue of that title, a competing claim to the land. Note also that the register and recorder were given quasi-judicial authority. The meaning of the acceptance of the Burat claim as a quasi-adjudication by a federal officer acting pursuant to this statute is a purely federal question and bears most vitally upon the issues at bar.

THE ACTS OF FEBRUARY 28TH AND APRIL 21, 1806.

The 1805 acts had made it necessary for the claimant to land to show that he had settled with the consent of the appropriate Spanish officer. The April 21, 1806 act waived this requirement:

> "Every person or persons claiming a tract of land by virtue of the second of the act, to which this act is a supplement, and who had commenced an actual settlement on such tract, prior to the first day of October, one thousand eight hundred and had continued actually to inhabit and cultivate the same, during the term of three years from the time when such actual settlement had commenced, and prior to the twentieth day of December eighteen hundred shall be considered as having made such settlement with the permission of the proper Spanish officer, although it may not be in the power of such person or persons to produce sufficient evidence of such permission."

It had also been necessary for the claimant to furnish a survey. The February 28, 1806 act abrogated this necessity:

> "That so much of the act, entitled "An act for ascertaining and adjusting the titles and claims to land within the territory of Orleans and the district of Louisiana," as makes it the duty of every claimant to lands, within the territory of Louisiana, to deliver to the recorder of land titles a plot of the tract or tracts, claimed by him, be, and the same is hereby repealed, so far as relates to claimants whose tracts had not been surveyed by the proper officer, under the Spanish government, prior to the twentieth day of December, one thousand eight hundred and three. And the commissioners appointed for ascertaining the titles and claims to lands, within either the territory of Louisiana or that of Orleans, are hereby authorized to direct the officer exercising the powers of surveyor-general, within the same to execute such surveys as they may think necessary for the purpose of deciding on claims presented for their decision."

Each of these Federal Statutes was necessary in perfecting the claim and is correspondingly important to this case. The survey act, however, is particularly vital for it was an erroneous United States survey -- not a Burat survey -- that made the outlaw titles possible. The import of this is clearly a Federal question.

THE ACT OF APRIL 25, 1812.

The 1812 act restructured the Board of Commissioners and refined their responsibilities and obligations. It confirmed however, their federal judicial authority, specifically providing that:

> "The said commissioners shall have power in their respective districts to inquire into the justice and validity of the claims filed with them as aforesaid; it shall be their duty to ascertain in every case whether the lands claimed have been inhabited and cultivated; at what time such inhabitation and cultivation commenced; when surveyed and by whom and what authority; and into every other matter respecting the claims which may affect the justice and validity thereof; and for that purpose shall have power to administer oaths and to compel the attendance of, and examine witnesses and such other testimony as may be adduced; to have access to all records of a public nature."

Once again, the meaning of the acceptance of the Burat claim, in the face of an existing title, must be adjudicated in this case and is a purely federal question.

ACT OF MAY 11, 1820 AND THE ACT OF FEBRUARY 6, 1835

This act extended the time for filing claims through December 31, 1820. Whether or not Burat secured rights by filing under this extension and the play of these rights against the outlaw titles is a federal question and must be resolved in the decision of this case. The same is precisely true of the Act of February 6, 1836 (4 Stat 749) pursuant to which his claim was finally reported. It is the plaintiffs position that some claim-right dating back to 1820 was secured to Burat by these Acts.

THE ACT OF JANUARY 12, 1825

This statute is critical and is reproduced in full.

> "Every person, of the legal representative of every person, who is or may be, a purchase of a tract of land from the United States, the purchase whereof is, or may be void, by reason of a prior sale thereof by the United States, or by the confirmation, or other legal establishment of a prior British, French or Spanish grant thereof, of for want of title thereto in the United States from any other cause whatsoever, shall be entitled to repayment of any sum or sums of money paid for, or on account of such tract of land on making proof, to the satisfaction of the Secretary of the Treasury, that the same was erroneously sold, in manner aforesaid by the United States, who is hereby authorized and required to repay such sum or sums of money, paid as aforesaid."

Pursuant to this act, the United States bought back two of the four sections deeded to Hodge. A buy-back under this statute would imply, we submit, that the outlaw titles are inferior to the Burat claim. What the meaning of the act and the buy-back might be is a federal question and one upon which a critical part of this case will resolve itself. It must also be determined whether or not the buy-back put the land beyond a levee board expropriation.

THE ACT OF JULY 6, 1842

Following a favorable reporting by the register and recorder, Congress confirmed the Burat claim (No. 60 on the report). The Statute recites that "...the claims...

bearing number...sixty...be and the same are hereby confirmed." The statute then makes an important caveat:

> "provided, always, that this is only to operate as a quit-claim on the part of the United States."

This statute is, of course, critical to the case. The deeding was, in the language used, a quit-claim of the interests of the United States. What that means and what that interest was, in view of the outlaw titles, are purely Federal questions and must be resolved.

THE ACT OF JUNE 2, 1858

It is clear, we submit, that Burat had an inchoate right in his estate, but for less than title, for less even than equitable title. The nature of that right may be described by the act of June 2, 1858 which provides in part:

> "...in all cases of confirmation by this act or where any private land claim has been confirmed by Congess, and the same in whole or in part, has not been located or satisfied either for want of a specific location prior to such confirmation, or for any reason whatsoever other than a discovery of fraud in such claim subsequent to such confirmation, it shall be the duty of the surveyor-general of the district in which such claim was situated, upon satisfactory proof that such claim has been so confirmed and that the same, in whole or part, remains unsatisfied to issue to the claimant, or his legal representatives, a certificate of location for a quantity of land equal

to that so confirmed and unsatisfied." (Emphasis added)

What exactly a confirmed but unsatisfied claim may be is by no means crystal clear. It is clear that in 1888, the surveyor general's opinion, when acting in a quasi-judicial Federal capacity, was that the shoe fit. What the nature of the beast is and what its relation to the Burat heirs' title might be are entirely federal questions.

II. THE DISTRICT COURT ERRED IN FAILING TO RECOGNIZE THAT THE CASE PRESENTED OTHER FEDERAL QUESTIONS UPON WHICH ITS RESOLUTION DEPENDED

There are also several federal questions essential to the case that a simple listing of the relevant statutes will not make plain. Certainly foremost is the precise meaning of the 1972 transmission of patent. The question might be stated this way: What rights did the United States have (pursuant to its sole control of the public domain), to transmit to the Burat heirs of 1972, in face of a state expropriation, and in view of the outlaw titles and the United States buy-back. Note once more that this is not any part of the defense, or an anticipated defense. It is the epicenter of the plaintiff's case and it is entirely Federal.

Other Federal questions are both plain and important:

1. What land rights flow from the United States to an actual settler (during Spanish dominion of Louisiana) upon the filing of settlement affidavits?

2. What land rights flow from the

United States to a settler by the act of official survey by the surveyor general pursuant to a land claim?

3. What title remains in the United States to lands acquired by a treaty with a foreign power, said treaty giving comity to whatever land claims commenced under the dominion of said foreign power, when subsequent to acquisitions by the United States:

a. A settlor files a land claim thereon pursuant to §14 of the Act of March 26, 1804 (2 Stat. 283), § 2 of the Act of March 2, 1805 (2 Stat. 324) and the Act of February 6, 1835 (4 Stat. 749).

b. Assuming (a) above, The United States then issues land patents to persons other than the original settlor and claimant.

c. Assuming (a) and (b) above, the United States Congress then confirms the claims of the original settlor and claimant.

d. Assuming (a), (b) and (c) above, the United States redeems the interfering patents of (b) by duly recorded public act of redemption.

e. Assuming (a), (b), (c), and (d) above, the United States then issues substitute land script and patents under an unrecorded succession of the original settlor and claimant.

4. At each juncture (through) (e) above, what elements of title were vested in the United States and what portion was vested in the original settlor?

5. What is the effect of congressional confirmation of a land claim which has been misidentified by an erroneous survey?

6. What is the effect of congressional confirmation of a land claim, title to which has since passed, or record, from the United States to a private land owner by a sale valid in form under the then existing laws?

7. What is the effect of the United States issuance of patents to lands without canceling previously issued patents to the same lands?

8. What is the effect of the United States issuance of patents to lands when the United States refuses to cancel previously issued patents to the same lands?

9. Is a state court empowered to declare void patents issued by the United States?

10. May a state court compel the United States to cancel patents?

11. May a state expropriate property, the record owner of which is the United States?

III. THE RULING LAW

The basic case law is crystal clear and often cited.

> When it appears in a suit that some title, right, privilege or immunity on which recovery depends, will be defeated by one construction of the constitution or laws of the United States, or sustained by the opposite construction, the case is one arising under the constitution or laws of

the United States.

Here that principle is decisive, for a correct construction of the Constitution will squarely prohibit any title chain based upon the unconstitutional expropriation of lands within the public domain. The affirmation of the 1972 satisfaction (by patent issue) of the Burat claim will have the same result as will an appropriate construction of the events surrounding the issuing of the two competing patents.

And it should be said at least once that the mere fact that a patent is at issue, while it may not create federal jurisdiction, does not destroy it. As the Court observed in as early a decision as Doolan v. Carr, 125 U.S. 618, 8 S. Ct. 228:

> No citizenship of either party is alleged and this is urged as a ground of reversal in this court, to which the case has been brought by a writ of error. It, however, appears very clearly that the controversary turns upon the validity of the patent from the United States under which plaintiff claims title, and which was denied by the defendants. The Circuit Court for the District of California, therefore, had jurisdiction of the case as one arising under the Constitution and laws of the United States.

Thus, as it is head-noted in the United States Reporter, the case is cited for the proposition that:

> The proper Circuit Court of the United States has jurisdiction, irrespective of the citizenship

> of the parties, of an action in ejectment, in which the controversy turns upon the validity of a patent of land from the United States.

The analogy to the case at bar is strong. The Burat heirs claim rights by virtue of a 1972 patent, the validity and the effectiveness of which are squarely at issue and what is more, squarely determinative of the entire case. To repeat a thought raised earlier, the validity of the United States patent (in the face of an earlier state expropriation) brings the case even more closely into the formula represented by Doolan.

Other authority reinforces this proposition. Consider McGilvan v. Ross, 215 U.S. 70 (1909) in which the Supreme Court dealt again with a federal patent. The court treated the question of jurisdiction this way:

> But whether such rights (in land) passed involved the construction of the acts of Congress under which the patents issued and necessarily of the effect of the patents, and presents a Federal question if prior decisions have not defined such rights and removed them from controversy.

No reasonable argument can be made that the rights at bar are clearly defined or removed from controversy -- unless of course, the defendants are prepared to stipulate that the lease-holds are clearly illegal. Somehow one doubts that they are to do so willingly. Absent this, however, the presence of Federal questions is entirely clear.

As a final note, it is interesting, and perhaps persuasive to note that the courts of

the State of Louisiana have rightly declined any competence to adjudicate a case like the one at bar, holding in Jones v. Wheelis 5 La. Ann. 541 (1849) that:

> Where the United States have recognized the claim of one of two persons pretending to be settlers on the public lands and have issued a patent to him, the courts of this state have no power, in the absence of any equities or evidence taking the case out of the general rule, to revise their decisions.

In any event, we submit it is abundantly clear that any challenge to the presence of a federal question is specious.

CONCLUSION

The Court below first held that the mere fact that title devolves from a United States patent does not of itself present a Federal question. That is true, BUT it is not the case at bar. Here two Federal patents were issued for the same land. The validity of each, both independently and in relationship to each other, must be tested by the statutes under which each patent was obtained.

The Court also held that it was clear that title to land passes out of the United States upon confirmation by Act of Congress rather than upon the subsequent issuance of a patent. This too is true as a general proposition. Here, however, there was in the interval, a second patent, issued to other persons. The pitting of these patents, the one against the other, must be resolved as a Federal issue and it can only be resolved through denying the validity of one of the patents involved.

The third essential feature of the decision below was the holding that the plaintiff's constitutional argument was no more than the anticipation of a defense. That is NOT true.

The constitution is not a defense here. To the contrary; it is the primary authority upon which Congress acted in confirming the Burat claim, in buying back part of the land and in disclaiming a part to the heirs. As such, the invalidity of the appropriation is an essential feature of the positive side of the plaintiff's case which must prove up a title good against the world.

Thus, in any perspective, the judgment dismissing the action for lack of a Federal question must be reversed and set aside and the case remanded for further proceeding.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Application for Writ of Certorari have been served on Richard J. McGinity, 1649 N.B.C.Building, New Orleans, La; Eugene Taggart, Whitney Building, New Orleans, La.; John T. McMahon and Alvin B. Gibson, P.O. Box 60193, New Orleans, La., 70160; Lawrence K. Benson and Wilson Shirley, Jr., 1100 Whitney Building, New Orleans, La.; Booth Kellough, John Bailey and William G. Duck, Saratoga Building and David Kerstein, 920 Whitney Building, New Orleans, La., this _____ day of October, 1974.

_____

APPENDIX A

HEIRS of Hubert BURAT (Buras), Plaintiffs-Appellants, Janet Easterling and Jack Buras, Movants-Appellants,

v.

BOARD OF LEVEE COMMISSIONERS OF the ORLEANS LEVEE DISTRICT OF the STATE OF LOUISIANA et al., Defendants-Appellees.

No. 73-2380.

United States Court of Appeals, Fifth Circuit.

July 15, 1974.

The heirs of a Louisiana pioneer brought a class action for declaratory judgment, money damages and injunctive relief, seeking to establish title to four sections of land settled by the ancestor prior to 1795. The United States District Court for the Eastern District of Louisiana, at New Orleans, Fred J. Cassibry, J., dismissed the complaint for lack of federal jurisdiction of the subject matter, and the heirs appealed. The Court of Appeals, Roney, Circuit Judge, held that a jurisdictional federal question was not raised merely because title to land devolved from a patent or because the case involved two conflicting patents, and that the United States Supreme Court's decision in the Oneida Indian Nation case was not precedent for such federal question jurisdiction.

Affirmed.

1. Courts ⇐281

Questions as to title and rights to land within state are of primary concern to that state and are not customarily business of federal courts. 28 U.S.C.A. § 1331.

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2. Courts ⇐285

Case involving title to Louisiana land devolving from patent originating before Louisiana Purchase did not involve federal question jurisdiction by reason of mere fact that title to land in question devolved from patent or under act of Congress, or because resolution of controversy required court to invalidate one of two conflicting federal patents. 28 U.S. C.A. §§ 1331, 1331(a).

3. Courts ⇐279

Matters of defense anticipatorily alleged do not create federal question jurisdiction. 28 U.S.C.A. § 1331.

4. Courts ⇐281

Federal district court did not have federal question jurisdiction over action involving claims to land in Louisiana by virtue of mere fact that land in question was allegedly wrongly appropriated from United States by state agency in violation of United States Constitution. 28 U.S.C.A. § 1331.

5. Courts ⇐298

Federal question jurisdiction did not exist over controversy involving conflicting claims to Louisiana land by virtue of facts that claimants' ancestor owned land during French and Spanish control of territory, which predated United States acquisition through Louisiana Purchase, that agency of state allegedly unconstitutionally expropriated the land, and that there was alleged continuing federal interest flowing from treaty underlying Louisiana Purchase. 28 U.S.C.A. § 1331.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before RIVES, GEWIN and RONEY, Circuit Judges.

RONEY, Circuit Judge:

The heirs of Hubert Burat, a Louisiana pioneer who died in 1847, bring this action as class plaintiffs, approximately 550 in number, for declaratory judgment, money damages and in-

junctive relief. They seek to establish title to four sections of land, over 700 acres, in Plaquemines Parish, Louisiana, settled by their ancestor prior to 1795, land once colorfully described as "Batture du Diable," the land of the devil. The complaint seeks money damages in the amount of $100,000,000 against the Board of Levee Commissioners of the Orleans Levee District, a state governmental agency, and nine other private and public defendants alleged to be bad faith possessors of the land. The plaintiffs request an injunction against the defendants' continued possession. The District Court, with a good statement of reasons, dismissed the complaint for lack of federal jurisdiction of the subject matter. We affirm.

The plaintiffs' brief tells us that the Burat settlement was some 60 miles below New Orleans on the east bank of the Mississippi River and that Burat endured flood, mosquitoes, storms, hurricanes and disease for his land. What is more, he did it all on his own. New Orleans was in those days a three-day trip by horse, and civilization's only real representative was a seasonal priest who made it "down below" perhaps once a year to solemnize marriages, christen babies and resolve quarrels. Thus, the base claim to ownership of the land by Burat predates the Louisiana Purchase.

The factual history since then is both interesting and complicated, but it is not necessary to this decision to make a complete recitation of that history. It involves disputes at various junctures in the chain of title since 1803. Although the Louisiana Purchase incorporated Burat's land into the United States, statutes formulated thereafter made it possible for Burat to claim the land on which he lived and worked. His attempts to perfect his title, however, went unsatisfied due to an erroneous survey which showed Burat's four sections of land to be where they were not, and at the same time showed those sections which he was actually settling and occupying with his family as being vacant. This error enabled others to file a claim for his land so that two lines of title developed. In 1837, a federal land register and recorder

included Burat's corrected claim in his report to Congress and in 1842, Congress confirmed Burat's ownership by special legislative act. In 1972 a patent for the tract was finally issued to the heirs of Hubert Burat, with this caveat:

> This patent shall only operate as a relinquishment of title on the part of the United States, and shall in no manner interfere with any valid adverse right to the same land, nor be construed to preclude a legal investigation and decision by the proper judicial tribunal between adverse claimants to the same land.

In the meantime, squatters and persons purporting to have ownership from the alleged erroneous claim of title took turns at occupying the land and in 1838 and 1839 patents were issued to these alleged "outlaw" claimants. During the period from 1924 to 1930, the Levee Board of the Orleans Levee District expropriated the property and became its owner. The Levee Board claims ownership through this expropriation and the other defendants claim leasehold interests from the Levee Board. The plaintiffs assert that this land was the exclusive property of the United States when it was expropriated and that the Levee Board exceeded its state authority and illegally and unconstitutionally assumed ownership of the lands in a proceeding the plaintiffs described as a farce.

The defendants' brief cautions us that the colorful recitation of history by the plaintiffs should not obscure the fact that neither Hubert Burat nor his heirs asserted any interest or claim to the land in over 100 years, and their present claim is based on assertion of legal title and not on any rights acquired by possession.

Regardless of the interesting history in Burat's line of succession, however, the specific question before us is whether, since there is no diversity of citizenship between the parties, the plaintiffs' claim of title raises any federal question upon which to posit federal court jurisdiction under 28 U.S.C.A. § 1331(a). Section 1331(a) provides original jurisdiction to district courts of all civil actions for over $10,000 wherein

the matter arises "under the Constitution, laws, or treaties of the United States." In bringing their suit, the heirs of Burat did not specify the federal question relied upon for jurisdiction but the trial court examined all allegations which might be considered as such and considered the contentions presented by plaintiffs in memorandum brief and oral argument to determine whether plaintiffs could, by amending their pleadings, state a case arising under the Constitution, laws or treaties of the United States, within the meaning of 28 U.S.C.A. § 1331. We too have considered lengthy oral argument and have carefully reviewed the briefs and authorities cited to us by the plaintiffs. Their brief lists a plethora of federal treaties, statutes, confirmations and patents: The Treaty of 1803 and The Acts of March 26, 1804 (2 Stat. 283); March 2, 1805 (2 Stat. 324); February 28 and April 21, 1806; April 25, 1812; May 11, 1820; February 6, 1835 (4 Stat. 749); January 12, 1825; July 6, 1842; and June 2, 1853. (The plaintiffs did not provide complete citations for these Acts, but our decision makes it unnecessary for us to examine them.)

The District Court found that federal jurisdiction, if existent, had to arise from the following allegations: (1) that plaintiffs' title to the lands derived from a United States patent issued on May 24, 1972, pursuant to a private claim confirmed by Act of Congress on July 6, 1842; (2) that the United States was the owner of the lands during the interim, but the patent had retroactive effect to the date of confirmation, and (3) that the defendant Board of Levee Commissioners wrongfully assumed ownership of the lands by various acts of expropriation during the period 1924 through 1932 in excess of its authority and in violation of the Constitution of the United States. In addition, plaintiffs assert that the United States has a continuing obligation to protect Burat's rights by virtue of the treaty obligations in the Louisiana Purchase.

Three principles to which we find no applicable exceptions foreclose federal jurisdiction of plaintiffs' claims: *first*, ques-

tions as to the title and rights to land within a state are of primary concern to that state and are not the customary business of federal courts; *second,* the fact that title derives from an Act of Congress or a United States patent does not raise a federal jurisdictional question; and *third,* federal jurisdiction must appear from those allegations necessary to state plaintiffs own claim and cannot rest upon the assertion that the defense raises or will raise a federal question. Finding further that the recent Supreme Court case of Oneida Indian Nation v. Oneida County, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974) does not furnish plaintiffs with a key to the federal courthouse, we leave the heirs of Burat to test their title in state court.

[1] That land title and possessory actions are normally not the business of federal courts is not questioned by plaintiffs and is such a firm concept that it needs no amplification. *See, e. g.,* Beauregard v. New Orleans, 59 U.S. (18 How.) 497, 15 L.Ed. 469 (1855); White v. Burnley, 61 U.S. (20 How.) 235, 15 L.Ed. 886 (1857); Mays v. Kirk, 414 F.2d 131 (5th Cir. 1969); *cf.* Aaron v. Florida Gas Transmission Co., 412 F.2d 802 (5th Cir. 1969).

[2] It has become a settled principle of law that a jurisdictional federal question is not raised merely because title to land devolves from a patent, such as Burat's 1972 patent, or under an Act of Congress, such as Burat's 1842 confirmation. Oneida Indian Nation v. Oneida County, 414 U.S. 661, 782, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974) [42 U.S.L.W. 4195]; Shulthis v. McDougal, 225 U.S. 561, 32 S.Ct. 704, 56 L.Ed. 1205 (1911); Joy v. St. Louis, 201 U.S. 332, 26 S.Ct. 478, 50 L.Ed. 776 (1906); Florida C. & P. R. R. v. Bell, 176 U.S. 321, 20 S.Ct. 399, 44 L.Ed. 486 (1900).

Plaintiffs cite only three cases which appear to hold contrary to this proposition, United States v. White, 17 F. 561 (C.C.Cal.1893); Doolan v. Carr, 125 U.S. 618, 8 S.Ct. 1228, 31 L.Ed. 844 (1887); and McGilvra v. Ross, 215 U.S. 70, 30 S.Ct. 27, 54 L.Ed. 95 (1909). We think these cases readily distin-

guishable. *White* was a suit by the United States to set aside a patent obtained from it by fraud; *Doolan* was well distinguished after the decision in Joy v. St. Louis, 201 U.S. 332, 26 S.Ct. 478, 50 L.Ed. 776 (1906), by the opinion in Taylor v. Anderson, 197 F. 383 (C.C.E.D.Okla.1911), aff'd 234 U.S. 74, 34 S.Ct. 724, 58 L.Ed. 1218 (1914); and the *McGilvra* litigation turned entirely on whether a United States patent to lakeshore property passed title to lands below the highwater mark, or whether those lands vested in the state upon its admission to the Union. Even if these cases and other earlier cases could not be successfully distinguished, we agree with the defendants that they must be disregarded in light of the large number of subsequent opinions that consistently establish the principle.

Indeed, the heirs tend to recognize the validity of this general legal principle but contend that their case is different. Specifically, they argue that the involvement of two conflicting patents, one in each chain of title, requires a federal court to entertain the suit since only a federal court can invalidate a federal patent. We have found no authority which requires only federal courts to choose between conflicting patents. In fact, California Powder Works v. Davis, 151 U.S. 389, 14 S.Ct. 350, 38 L.Ed. 206 (1894), leads us to an opposite conclusion. The factual situation there was strikingly similar to that in the instant case: two parties claimed fee simple ownership of the same tract of California land originating from Mexican grants prior to the Treaty of Guadalupe Hidalgo. After the treaty, each party perfected its ownership to include two separate confirmations and patents from the United States. A quiet title suit was initiated in the California state courts which determined the rightful owner, ostensibly holding one federal patent to be inapplicable. The United States Supreme Court dismissed a writ of error to the California Supreme Court on the basis of no federal appellate jurisdiction. The California court's "invalidation" of a federal patent was upheld, disputing the Burats' contention that only federal courts

can sort through conflicting patents. A federal question is not automatically raised because there are conflicting federal patents. Indeed, the courts of Louisiana have adjudicated contents between parties claiming title to lands under separate federal sources. *See, e. g.*, Lott v. Prudhomme, 3 Rob. 293 (1842); Watterston v. Bennett, 18 La.Ann. 250 (1866); Walsh v. Lallande, 25 La.Ann. 188 (1873); State v. Bozeman, 156 La. 635, 101 So. 4 (1924).

[3, 4] A second persuasive reason that a federal question as to a conflicting patent would not support plaintiffs' jurisdictional claim furnishes the answer to another significant fact upon which the heirs rest their claim to federal jurisdiction: the alleged wrongful expropriation of the land by the Levee Board in violation of the United States Constitution. It is agreed that the Burats have sought to bring what would be called under Louisiana law, a petitory cause of action, a civil action to adjudge title to and ownership of real estate as distinguished from one to try merely the right of possession, the equivalent of the common law action for ejectment to try title. The essential allegation in such an action is that the plaintiffs have title to lands possessed by the defendants. Just as plaintiffs' case rests on the strength of its own patent, not the possible invalidity of a conflicting patent, the attack on the defendants' title through allegations of wrongful and unconstitutional expropriation is not essential to the Burats' cause of action. Such allegations amount to possible defense on the strength of conflicting claims and to a negation of the Levee Board's possible expropriation defense. It is well settled that matters of defense anticipatorily alleged do not create federal question jurisdiction. Gully v. First National Bank, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936). Such attempts must fail under the "well-pleaded complaint" rule, stated in Taylor v. Anderson, 234 U.S. 74, 34 S.Ct. 724, 58 L.Ed. 1218 (1914) as follows:

> But the contention overlooks repeated decisions of this court by which it has become firmly settled that whether a case is

> one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute (now § 24, Judicial Code), must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose.

234 U.S. at 75. *Accord* Joy v. St. Louis, 201 U.S. 332, 26 S.Ct. 478, 50 L.Ed. 776 (1906); Florida C. & P. R. R. v. Bell, 176 U.S. 321, 20 S.Ct. 399, 44 L.Ed. 486 (1900).

The Burats argue that their cause of action requires them to affirmatively show "title good against the world," thus making the wrongful expropriation an essential element of their case. Their case does not depend, however, on the expropriation; it depends on the patent involved through which the Burats claim ownership. The Burats recognized this point in their reply brief when they reduced the case to its simplest terms:

> The plaintiff must prove a title; to do so he must prove that he holds a valid federal patent; accordingly, he must establish that his patent right is, in the face of other federal patents on the same land, the only patent of federal validity.

This is nothing more than any plaintiff would have to prove to succeed in an action of this kind. Proving that the Levee Board's expropriation was unconstitutional or that other patents are invalid is not part of the proof that their patent is valid. As stated in 1 Moore Fed.Practice, § 0.60(8–3) at 632:

> In determining whether plaintiff's claim is one "arising under," the elements of the claim must be understood. Thus if the action is one involving possession of real property and the plaintiff is out of possession so that his suit is essentially ejectment, the action can seldom if ever present a case "arising under," unless the plaintiff or defendant is a federal corporation. The reason is that a proper statement

of claim consists of general allegations such as, plaintiff is the owner in fee simple of certain described property, the defendant wrongfully withholds possession, the plaintiff is entitled to immediate possession, and his damages, if any. No federal question emerges from this generalized, concise statement, whether plaintiff's title comes remotely or directly from the United States.

[5] Finally, the Burats attempt to draw a parallel between their case and the recent Supreme Court decision in Oneida Indian Nation v. Oneida County, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974) in which the Court found federal question jurisdiction over a land dispute between the Oneida Indians and the State of New York. In analyzing the case, the Burats contend that federal question jurisdiction rests on three controlling factors: (1) that the claimant have a possessory right which predated the United States acquisition of the land; (2) that there be an unconstitutional taking by the state; and (3) that there remains a continuing federal interest. In *Oneida*, these requirements were met by the Oneida Indians' aboriginal ownership of the land, the unconstitutional taking by the State of New York, in violation of the Nonintercourse Act, 1 Stat. 137, and the continuing treaty obligations of the United States to uphold and protect the Indians' lands. The Burats contend the fact situation at bar is parallel: (1) Hubert Burat owned the land during French and Spanish control of the territory which predated the United States acquisition through the Louisiana Purchase; (2) an agency of the State of Louisiana unconstitutionally expropriated the land, and (3) there is a continuing federal interest flowing from the Treaty of 1803, which recognized the rights of those settled in the territory, various statutes which outlined the procedure for perfecting title, and the fact that certain portions of the Burat tract remained in the public domain.

We find little guidance in the *Oneida* decision that helps the Burats. That case involved a federally protected right of an Indian tribe to possession of land. First, the Supreme Court

focused on the facts that Indians were involved in *Oneida*, and much of the opinion was spent tracing the development of federal judicial treatment of Indian claims. The Court reiterated the proposition "that Indian title is a matter of federal law." 414 U.S. at 670. As Justice Rehnquist's concurring opinion points out, the case would have been quite possibly different had not the Indians' particular relationship with the United States been present.

Second, the unconstitutional taking in *Oneida* stemmed from the Indians' cession of reservation lands to the State of New York. This conveyance was forbidden without the consent of the United States under the Nonintercourse Act of 1790, 1 Stat. 137. In this case, however, it is alleged that the Levee Board unconstitutionally took land that was in the public domain and under congressional control. The Burats do not have standing to contest the expropriation of United States owned land, nor do they have standing to contest the taking of privately owned land from other owners. Their claim to the land must rise or fall on their own title.

Third, the treaty protection given Burat was not equivalent to that given the Oneida Indians. The Indian treaties guaranteed to the *tribe* a right of occupancy, a present and continuing right to possession which could not be divested except by the United States. The Treaty of 1803 made no such guarantees to the Burats. In Chouteau v. Eckhart, 43 U.S. (2 How.) 344, 11 L.Ed. 293 (1844), the Supreme Court interpreted the governmental obligations flowing from the Treaty of 1803:

> 'inchoate claims . . . were not changed in their character, by the treaty by which Louisiana was acquired; that the treaty imposed on this government only a political obligation to perfect them; that this obligation, sacred as it may be, in any instance, cannot be enforced by any action of the judicial tribunals; and that the legislation of Congress, from 1804, to the present time, has proceeded upon this construction of the treaty, as is manifested by the modes

adopted to investigate the claims through boards of commissioners, and then acting on them by legislation.

43 U.S. at 358–359. The treaty recognized that the inhabitants had certain property rights. The subsequent statutes merely enabled the inhabitants to perfect those rights. There was no guarantee of possession as in the Indian treaties.

The plaintiffs have failed to point out and we are unable to find any substantial federal issues, the determination of which would be decisive of plaintiffs' claim.

> A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States.

Shulthis v. McDougal, 225 U.S. 561, 569, 32 S.Ct. 704, 706, 56 L.Ed. 1205 (1911). We hold that the heirs of Burat have not presented a federal question under 28 U.S.C.A. § 1331.

Affirmed.

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APPENDIX B

Minute Entry
April 23, 1973
Cassibry, J;

HEIRS OF HUBERT BURAT (:URAS) CIVIL ACTION

versus NO. 72-1798

BOARD OF LEVEE COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT OF THE STATE OF LOUISIANA; LOUISIANA WILDLIFE & FISHERIES COMMISSION; GULF REFINING CO.; STANDARD OIL OF CALIFORNIA; SHELL OIL CO., ESTATE OF WILLIAM G. HELIS, his heirs and assigns; CHEVRON OIL CO., LOUISIANA POWER & LIGHT CO., (Formerly known as PEOPLES UTILITIES, INC.); and PHILIP A. GROVE SECTION "E"

This cause came on for hearing on September 27, 1972 on motions to dismiss for lack of federal jurisdiction, filed on behalf of defendants Board of Levee Commissioners of the Orleans Levee District of the State of Louisiana, Gulf Refining Company, Shell Oil Company, Estate of William G. Helis, his heirs and assigns, Louisiana Power & Light Company (formerly known as Peoples Utilities, Inc.) and Philip A. Grove and Chevron Oil Company,was argued and submitted.

After due consideration thereof IT IS ORDERED, ADJUDGED AND DECREED that defendants motions be, and they are hereby, GRANTED.

s/ Fred J. Cassibry
UNITED STATES DISTRICT JUDGE

REASONS

This non-diversity action involves the title to certain land in Plaquemines Parish, Louisiana. The defendants moved to dismiss for failure of the complaint to state the existence of a federal question. This Court has closely examined the question and has concluded that this case does not arise under the Constitution, laws, or treaties of the United States within the meaning of 28 U.S.C.A. §1331.

Plaintiffs request judgment declaring (a) that they, as a class representing the heirs of Hubert Burat, received good title to the lands from the United States by patent dated May 24, 1972, retroactive to July 6, 1842, the date of the Act of Congress confirming the private claim of Hubert Burat, pursuant to which the patent issued; and (b) that the Act and/or Acts of Expropriation against the land by defendant, the Board of Levee Commissioners of the Orleans Levee District, were in violation of the Constitution of the United States.

The complaint does not specify the federal question relied upon for jurisdiction; therefore, the Court has examined all allegations which might be considered as such. These allegations in summary are: (1) that plaintiffs' title to the lands derived from a United States Patent issued on May 24, 1972 pursuant to a private claim confirmed by Act of Congress on July 6, 1842; (2) that the United States was the owner of the lands during the interim, but the patent had retroactive effect to the date of confirmation, and (3) that the Board of Levee Commissioners wrongfully assumed ownership of the lands by various acts of expropriation

during the period 1924 through 1930 in excess of its authority and in violation of the Constitution of the United States.

As to the first possible basis, the fact that title comes from a patent or under an Act of Congress does not show a federal question. Joy v. St. Louis, 201 U.S. 332, 50 L.Ed. 776 (1906); Florida Central & Peninsular Railroad Co. v. Bell, 176 U.S. 321, 44 L.Ed. 486 (1900); Shulthis v. McDougal, 225 U.S. 561, 56 L.Ed. 1205 (1912); Kirklin v. Ellerbe, 278 F. 168 (5th Cir. 1922).

As to the second, the Supreme Court has so often held that title to land passes out of the United States upon confirmation by Act of Congress, not upon subsequent issuance of the patent that the question is no longer open to discussion. McGilvra v. Ross, 215 U.S. 70, 54 L.Ed. 95 (1909); Langdeau v. Hanes, 88 U.S. 521, 22 L.Ed. 606 (1875); Grignon v. Astor, 2 How. 319, 11 L.Ed. 283 (1844); Joplin v. Chachere, 192 U.S. 94, 48 L.Ed. 359 (1904); Mc Nee v. Donahue, 142 U.S. 587, 35 L.Ed.1122 (1892); Gouner v. Polmer, 156 F.2d 207 (5th Cir. 1946); Sanchez v. Deering, 298 F. 286 (5th Cir. 1924), aff. 270 U.S. 227, 70 L.Ed. 556.

The allegations with respect to the unconstitutional expropriation, forming the third possible basis, are not essential to plaintiffs' cause of action. This is a petitory action, similar to the common law action at law in ejectment, in which the essential allegations are that the plaintiffs have title to the lands in possession of the defendants. Allegations regarding expropriation are matters of defense. For the purpose of creating federal question jurisdiction, plaintiffs may not anticipate

defenses by alleging more than the essential allegations of a well pleaded complaint. Gully v. First National Bank, 299 U.S. 109, 81 L.Ed. 70 (1936); Taylor v. Anderson, 234 U.S. 74, 58 L.Ed. 1218 (1918); Huckins v. Duval County, Florida, 286 F. 2d at 49 (5th Cir. 1960); Joy v. City of St. Louis, supra, Mays v. Kirk, 414 F.2d 131, 132 (5th Cir. 1969), 1 Moore Fed. Practice, §0.60 (8-3), p. 632.

The fact that plaintiffs ask for declaratory and injunctive relief does not change their cause of action so as to confer federal jurisdiction where it would not otherwise exist. White v. Sparkill Realty Corporation, 280 U.S. 500, 74 L.Ed. 578 (1930); Urban Renewal Authority for City of Trinidad v. Daughtery, 271 F.Supp. 729 (Colorado 1967); Lang v. Colonial Pipeline Company, 266 F.Supp. 552 (E.D. Penn. 1967), 2 Moore Fed. Practice, §2.07(3), pp. 404-405. The claim for damages is entirely dependent upon the claim of ownership and,of course, must also be dismissed for lack of jurisdiction. See Tircuit v. Burton--- Swartz Cypress Co. 162 La. 319, 110 So. 489 (1926), Florida Central & Peninsular Railroad Co. v. Bell, and other cases cited above.

In addition to the complaint the Court has also considered the contentions presented by the plaintiffs in memorandum brief and in oral argument to determine whether plaintiffs can, by amending their pleadings, state a case arising under the Constitution, laws or treaties of the United States, within the meaning of 28 U.S.C.A. §1331. For one or more of the reasons assigned above, the Court is of the opinion that the jurisdictional defect in plaintiffs' complaint cannot be cured by amendment.

Accordingly, let judgment be entered herein, dismissing plaintiffs' suit for lack of jurisdiction.

s/ Fred J. Cassibry
UNITED STATES
DISTRICT JUDGE

copy to all counsel of record.

APPENDIX C

ARTICLE 4 OF THE CONSTITUTION

Section 3, Clause 2. Public Lands

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.